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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-1045

Franz J. Tomasino,
Pertitioner,

v

State of California

Petition
For a Writ of Certiorari
To the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John N. Frolich
Attorney for Pertitioner
727 West 7TH Street
Los Angeles, California 90017

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IN THE
SUPREME COURT
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No.

FRANZ J. TOMASINO,
Petitioner,
V.
STATE OF CALIFORNIA

PETITION
FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, FRANZ J. TOMASINO, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals, for the Ninth Circuit, in the proceedings therein, on November 11th, 1971.

OPINION BELOW

The Opinion, of said Court of Appeals, as yet unreported, is reproduced in Appendix A, as is the Order of the United States District Court, Central District of California, entered on November 13th, 1970.

JURISDICTION

The Opinion and Judgment, of said Court of Appeals, with 1 Dissent, was entered on November 11th, 1971; thereafter, a Petition for Rehearing was filed in said Appellate Court, whereupon, said Court issued its Order, with 1 Dissent, denying said Petition, said Order being entered on December 16th, 1971.

A Hearing was had in said District Court, on the Filing and Spreading of the Appellate Court's Judgment, on January 10th, 1972, at which time said District Court issued its Order staying the Remand to the State court, said Stay-Order being conditioned upon Petitioner's filing the

herein Petition, in this Court, on or before February 10th, 1972.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED

Petitioner removed his Case, before a State court, to said District Court, pursuant to 28 U.S.C. §1443(1), whereupon, said court, determining that "good cause appearing therefor", ordered the State to respond thereto "on or before November 12, 1970"; this, it did by filing a Motion for Remand which did not comply with the requirements of Local Court Rule 3(e)1, and served Petitioner, by Mail, the same day. On November 13th, 1970, said District Court, without according Petitioner a hearing on said Motion, signed the State-prepared Order of Remand, an act that raises the following questions:

(a) Is a criminal prosecution, removed with "good cause appearing therefor", subsequently remandable without an adversary hearing thereon?

(b) Is a Motion, filed in a District Court, which does not comply with said Court's Rule 3(e)1 pertaining thereto, validly before said Court so as to warrant its action thereon?

(c) Is a District Court empowered to act ex parte with regard to a removal Petition, after an adversary proceeding concerning said Petition, is before it?

CONSTITUTIONAL, AND RULES, PROVISIONS INVOLVED

United States Constitution-

5th Amendment -

No person shall...be deprived of life, liberty, or property, without due process of law...

United States District Court Local Rules -

Central District of California -

Rule 3(e)1 -

When there has been an adverse appearance, a written notice of motion shall be necessary...

Any notice of motion...shall be served upon the adverse party, or his attorney, and filed with the clerk of this court not later than seventeen days before the day designated in the motion as the hearing date...

STATEMENT OF THE CASE

On or about November 5th, 1970, Petitioner, charged with an alleged violation of Section 23101, California Vehicle Code, in a Case pending in the California Supe-

rior Court, filed, pursuant to 28 U.S.C. §1443(1), a Petition, for Removal of said Criminal Prosecution, in said United States District Court, in full compliance with 28 U.S.C. §1446(a)(c); whereupon, said Federal court, on or about November 6th, 1970, ordered the District Attorney, for said State, to respond to said Petition on or before November 12th, 1970, which he did by serving Petitioner, by mail, as he timely filed, in said District Court, a Response, including a Motion for Remand that did not comply with the mandatory requirements of Local Court Rule 3(e)1, pertaining to Motions and the filing thereof in said District Court.

Simultaneously with the filing of said Response and Motion, an Order of Remand, prepared by said District Attorney, was lodged in said Court.

On or about November 13th, 1970, said District Court, without according

Petitioner a hearing on said Motion for Remand, executed the State-prepared Order of Remand, therewith remanding Petitioner's Case to said State court.

REASONS FOR GRANTING THE WRIT

Petitioner seeks, from this Court, a review on Writ of Certiorari because the Court of Appeals, for the Ninth Circuit, has rendered a decision that -

(1) has so far departed from the accepted and usual course of judicial proceedings,

(2) has so far sanctioned such a departure by the lower court,

as to call for an exercise of this Court's power of supervision.

Petitioner queries -

(a) Is A Criminal Prosecution, Removed With "Good Cause Appearing Therefor", Subsequently Remandable Without An Adversary Hearing Thereon?

The lower court, on November 6th,

1970, issued its "Order On Petition For Removal Pursuant To 28 USC 1443(1)":

> The petitioner having filed a Petition for Removal of Criminal Prosecution pursuant to Title 28, §1443(1), United States Code, and good cause appearing therefor,
>
> IT IS HEREBY ORDERED that the District Attorney, Superior Court of the State of California, in and for the County of Los Angeles, Los Angeles, California file a response thereto on or before the 12th day of November, 1970.

Thus, in its Order, the lower court declared that Petitioner, having filed a Petition for Removal of a Criminal Prosecution, with "good cause appearing therefor", therewith accepted jurisdiction.

"Good cause" has been defined as a -

LEGALLY SUFFICIENT GROUND OR EXCUSE.

Jackson v. United States,

C.A.9 295 F. 620, 622.

According to Black's Law Dictionary, 4th. Edition, the word "legally" is defined as:

LAWFULLY; ACCORDING TO LAW.

So, in effect, the lower court, by its acknowledgement that Petitioner had filed his Petition for Removal with "good cause appearing therefor", i.e., that there was a "legally sufficient ground or excuse" therefor, was removed "according to law", therewith determined that it had jurisdiction of the matter - the matter of removability was then decided, inasmuch as -

THE QUESTION OF REMOVABILITY IS TO BE DECIDED IN THE FEDERAL COURT RATHER THAN IN THE STATE COURT.

Flowers v. Aetna Casualty Co., (1947) 163 F.2d 411.

Upon its ordering the State to respond to said Petition, instead of permitting the State to determine, voluntarily,

its course of action with regard thereto, the lower court so far departed from the accepted and usual course of judicial preceedings, as pertains to the removal of cases, and the Appellate Court's decision has so far sanctioned such a departure, by the lower court, as to call for the exercise of this Court's power of supervision.

And particularly is this so inasmuch as said lower court, by ordering the State to respond to said Petition, a Response having joined thereto a Motion for Remand, forced an adversary proceeding into existence, invoked a Motion procedure, and then foreclosed Petitioner from having a hearing therein by its immediate execution of the State-prepared Order of Remand, thereby denying him of his constitutional right to be heard on said Motion.

THE RIGHT OF A LITIGANT TO BE HEARD IS ONE OF THE FUNDAMENTAL

RIGHTS OF DUE PROCESS OF LAW.

Council of Fed. Organizations v. Mise, (1964) 339 F.2d 898.

Furthermore,

DUE PROGESS REQUIRES COMPLIANCE NOT ONLY WITH THE OUTWARD FORM OF THE LAW BUT WITH ALL THAT IS IMPLICIT IN THE CONCEPT WITH ORDERED LIBERTY AND WITH THE IMMUTABLE PRINCIPLES OF JUSTICE.

United States v. Rosenberg, (1952) 108 F.Supp. 798, aff'd. 200 F.2d 666.

In the lower court, there was no compliance with, or even "lip-service" to, the outward form of the law, said 5th Amendment.

THIS AMENDMENT REQUIRES THAT THERE SHALL BE A HEARING AT WHICH EACH PARTY CAN BE HEARD AND BY VIRTUE OF WHICH A SUBSTANTIAL ENJOYMENT OF HIS CONSTITUTIONAL RIGHTS IS PRESERVED.

Gordon v. Bowles, (1946) 153 F.2d 614.

And, what is more,

> THE "HEARING" NECESSARY TO MEET THE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS IS A HEARING OF EVIDENCE AND OF ARGUMENT BY THE ONE WHO MUST MAKE THE DECISION.
>
> Fed. Trade Comm. v. Scientific Living, Inc., (1957) 150 F.Supp. 495, aff'd 254 F.2d 598.

The Record shows the blatant disregard, on the part of the lower court, for procedural due process of law as is disclosed by the Declaration of Service by Mail, executed by said District Attorney, whereon is indicated that the Response and Motion to Remand; and Order, was mailed to Petitioner's Attorney on November 12th, 1970, the documents therein designated presumably being delivered on November 13th, 1970, thereby completing service on Petitioner on the same date the lower court executed the State-prepared Order of Remand, therewith conclu-

sively precluding Petitioner from any enjoyment whatsoever of his constitutional rights of "due process of law", either as to his being heard in argument and his presentation of evidence, and of having the lower court hear him therein.

The State, in its Response, took issue with the statements in said Petition, which points up the fact that -

IF THE PLAINTIFF TAKES ISSUE WITH STATEMENTS IN A REMOVAL PETITION, THE ISSUES MUST BE DETERMINED BY THE FEDERAL DISTRICT COURT.

Morris v. DuPont De Nemours., (1934) 68 F.2d 788. See: Farmers Bank v. A.T.S.F. Ry. Co., (1928) 25 F.2d 23.

However, the lower court, by its immediate execution of said Order of Remand on November 13th, 1970, an Order in direct conflict with its previous Order, executed on November 6th, 1970, summarily "determined" said issues, thereby abrogating Petitioner's constitutional rights of Due Process of

Law, contrary to the fact that -

A MOTION TO REMAND WILL BE DETERMINED ON THE SUFFICIENCY OF THE ALLEGATIONS OF THE REMOVAL PETITION.

Farmers Bank v. A.T.S.F. Ry. Co., (1928) 25 F.2d 23.

and that -

A MOTION TO REMAND A CAUSE REMOVED FROM A STATE COURT IS IN THE NATURE OF A DEMURRER, AND GOES ONLY TO MATTERS APPARENT OF RECORD.

Gibson v. Chesapeake & O. Ry. Co., (1914) 215 F. 24.

A MOTION TO REMAND DOES NOT OPERATE AS A GENERAL DENIAL OF THE ALLEGATIONS OF THE PETITION FOR REMOVAL.

Phillips v. Western Terra Cotta Co., (1909) 174 F. 873.

so as to have warranted the lower court's foreclosure of Petitioner's right to a hearing on the Response. Furthermore,

THE MERITS OF A PLAINTIFF'S CLAIM CANNOT BE DETERMINED ON A MOTION TO

REMAND A CAUSE TO A STATE COURT.

Rosecrans v. Wm. S. Lozier, Inc., (1944) 142 F.2d 118.

As pertains to Petitioner's Petition,

GENERALLY, A MERE MOTION TO REMAND DENYING MATERIAL FACTS IS NOT SUFFICIENT TO OVERCOME THE AVERMENTS OF REMOVANT'S WELL-PLEADED PETITION.

Smith v. City of Jackson, (1966) 358 F.2d 705.

* * * * * * *

The Court of Appeals, for the Ninth Circuit, in its affirmance of the lower court's Order remanding Petitioner's Case to the State court, cited Pobuta, Potter, Harmon, and Sanders (see Appendix A, page 2, par. 1), and alleged that he relied thereon in seeking a reversal of said Remand; and declared that, in affirming the lower court's Order, it did not depart from the decisions announced in those cases.

The Potter, Harmon, and Sanders Cases are dissimilar from Petitioner's

Case in that each of them were civil actions filed initially in the Federal District Court, whereas, Pobuta and Petitioner's Cases were removals from State courts. The first three Cases were Civil Rights Cases in which the Appellant, in each instance, had been denied "due process of law", which, in Potter, the Appellant had not been given an opportunity to submit a written opposition to a motion for dismissal, was not given a statement of grounds for the dismissal, and given an opportunity to amend his Complaint so as to overcome its defects; in Harmon, Appellant's Case was dismissed on the court's own Motion because the Complaint failed to state a proper cause of action, without his having an opportunity to be heard; in Sanders, Appellant's Case was dismissed, by the court, without his being given notice that a dismissal of his Complaint - for failure to state a cause

of action - was being contemplated, nor was he given an opportunity to file an opposition thereto.

In Pobuta, the same day that Appellant filed his Petition for Removal in the District Court, it entered a minute-order denying the Petition and remanding his Case to the State court.

However, Petitioner stands in a saliently different position from any and all of them in that the lower court ordered the State to respond, thereby creating an adversary proceeding before it. According to Black's Law Dictionary, 4th Ed., an "adversary proceeding" is defined as -

> "One having opposing parties; contested, as distinguished from an ex parte application; one of which the party seeking relief has given legal warning to the other party, and afforded the latter an opportunity to contest it.

In Petitioner's instance, he was not given a "legal warning" - he was not served with a Notice of Motion, as is the accepted and usual course, in Motion procedure - nor was he afforded an opportunity to contest...two fundamental rights of due process.

About this matter of due process, as pertains to Petitioner's Case, this Court ruled, in Chessman v. Teets, (1957) 354 U.S. 156, 77 S.Ct. 1127, to the effect that -

> THE REQUIREMENTS OF DUE PROCESS MUST BE RESPECTED NO MATTER HOW HEINOUS THE CRIME IN QUESTION MAY BE AND NO MATTER HOW GUILTY AN ACCUSED MAY ULTIMATELY BE FOUND TO BE AFTER GUILT HAS BEEN ESTABLISHED IN ACCORDANCE WITH THE PROCEDURE DEMANDED BY THE CONSTITUTION.

However, the Appellate Court, while having ruled, in Potter, Harmon, Sanders,

and Pobuta, that each of them had been denied the right to be heard, or the equivalent thereof, as well as the right to amend their Complaints - said ruling being without equivocation - in Petitioner's Case, Schneider and Perdue notwithstanding, he was denied the right to be heard, as well as the right to amend his Petition, should it be necessary.

THE FEDERAL DISTRICT COURT HAS THE POWER TO PERMIT THE AMENDMENT OF A PETITION FOR REMOVAL.

Torquay Corp. v. R.C.A.,
(1932) 2 F.Supp. 841.

The action taken against Petitioner, in both the trial and the appellate courts, is in complete derogation of his rights under the "supreme law of the land", the 5th Amendment, as well as under 42 U.S.C., §1981, which provides that -

ALL PERSONS WITHIN THE JURISDICTION OF THE UNITED STATES SHALL HAVE THE SAME RIGHT IN EVERY STATE...TO

SUE, BE PARTIES, GIVE EVIDENCE, AND TO THE FULL AND EQUAL BENEFIT OF ALL LAWS AND PROCEEDINGS FOR THE SECURITY OF PERSONS...

THIS SECTION, SO FAR AS IT CONFERS RIGHTS, IS NOT LIMITED TO NEGROES AND COLORED PERSONS; IT CONFERS RIGHTS ON WHITE PERSONS, AND PUTS IN THE FORM OF A STATUTE WHAT HAS BEEN SUBSTANTIALLY ORDAINED BY THE CONSTITUTION.

Kentucky v. Powers, (1905) 139 F. 452.

The lower court, in Miller v. Reddin, (1968) 293 F.Supp. 216, even declared that -

THE BASIC PURPOSE OF THIS SUBCHAPTER IS THE PROTECTION OF FEDERAL RIGHTS, PRIVILEGES AND IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES TO ALL CITIZENS THEREOF AND OTHER PERSONS WITHIN ITS JURISDICTION.

To restate the proposition -

CONSTITUTIONAL AND STATUTORY CIVIL

RIGHTS ARE FOR THE PROTECTION OF PERSONS AGAINST DISCRIMINATORY LEGISLATION OR TREATMENT.

Mosher v. Beirne, (1966) 357 F.2d 638.

Said Section 1981 secures to Petitioner "the same right", as the cited persons, "to sue, be (a) part(y), give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons", and his "constitutional and statutory civil rights" are for his protection "against discriminatory treatment" such as he has received in the lower, and appellate, courts, the dissenting opinion indicating as much, and the lower court inferably concurring therewith by its staying the spreading of the record pending the filing of this Petition in this Court.

It is manifest, from the foregoing, that the Appellate Court has rendered a a decision that has so far departed from

the accepted and usual course of judicial proceedings, that has so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

- * -

(b) Is A Motion, Filed In A District Court, Which Does Not Comply With Said Court's Rule 3(e)1 Pertaining Thereto, Validly Before Said Court So As To Warrant Its Action Thereon?

Petitioner came before the lower court by a Petition for Removal pursuant to 28 U.S.C. §1443(1) wherein was succinctly stated why he could not enforce, in the State court, his right to "equal protection of the laws" - 14th Amendment - as well as his right "to be subject to like punishment, pains, penalties..." 42 U.S.C. §1981.

Said lower court, having the foregoing facts before it, preambled its

Order to said District Attorney with -

"The petitioner having filed a Petition for Removal of Criminal Prosecution pursuant to Title 28, §1443(1), United States Code, and good cause appearing therefor..." (underscore added)

which, according to Black's Law Dictionary, 4th Ed., page 279, was good "reason; motive; matter of excuse or justification". Petitioner, in other words, by the facts presented in his Petition, had stated a valid ground for the removal of his Case from said State court, and the lower court so decided.

REMOVAL IS EFFECTED ENTIRELY BY AN EX PARTE PROCEDURE, AND A FEDERAL COURT MUSY CLEARLY CONCERN ITSELF AS TO WHETHER OR NOT THERE HAS BEEN A VALID REMOVAL.

M. A. Jacobs, Inc. v. Manning Mfg. Corp., (1969) 171 F.Supp. 393.

As a consequence, the lower court, when stating, in its Order to the State, that Petitioner had filed said Petition with "good cause appearing therefor", that was tantamount to its declaring that he was denied, and could not enforce, in said State court, "a right under any law providing for the equal civil rights of all persons within the jurisdiction" of the United States, and of said State. Thus, did said lower court accept, and acknowledge, jurisdiction - both of the subject-matter, and of Petitioner's person.

However, from that point, on, the procedural handling of Petitioner's Case was deviant.

Instead of permitting the State to determine, on its own volition, whether or not it desired to pursue the matter into the Federal court, said lower court interposed its will and expressly ordered

the State to respond to said Petition "on or before the 12th day of November, 1970", to which Order the State responded, simultaneously therewith filing a Motion to Remand.

Rule 3(e)1, Local Rules, of the lower court, requires that -

> When there has been an adverse appearance, a written notice of motion shall be necessary...
>
> Any notice of motion...shall be served upon the adverse party, or his attorney, and filed with the clerk of this court not later than seventeen days before the day designated in the motion as the hearing date... (underscore added)

THE RULES OF PRACTICE ADOPTED BY THE UNITED STATES DISTRICT COURTS HAVE THE FORCE AND EFFECT OF LAW, AND ARE BINDING UPON THE PARTIES, AND THE COURT WHICH PROMULGATED THEM,

UNTIL THEY ARE CHANGED IN AN APPROPRIATE MANNER.

Woods Const. Co. v. Atlas Chem. Ind., Inc., (1964) 337 F.2d 888.

Said Motion to Remand, as filed by the State, did not comply with the mandatory requirements of said Rule 3(e)1 in that Petitioner, the adverse party, was not served with a "written notice of motion", nor was "any notice of motion filed with the clerk not later than seventeen days before the date designated as the hearing date".

Inasmuch as -

COURT RULES HAVE THE FORCE OF LAW.

Link v. Wabash Ry. Co., (1961) 291 F.2d 542, aff'd. 370 U.S. 626, 82 S.Ct. 1386.

it is patent that, from November 12th, 1970, at 3:59 o'clock P.M., when said Response, with Motion To Remand, was filed, the entire procedure ultimating in an ostensible

remand of Petitioner's Case to said State court, was totally lawless, was totally ineffective to dislodge his Petition For Removal from the lower court because, the lower court had declared the validity of said Removal when it declared that there was "good cause appearing therefor".

An examination of the Preambles to the two Orders, issuing out of said lower court, discloses that it did not seriously consider what the State had prepared for its adoption and signature, the Preamble of the November 6th Order being -

> "The petitioner having filed a Petition for Removal of Criminal Prosecution pursuant to Title 28, §1443(1), United States Code, and good cause appearing therefor..."

and, in direct contrast, the Preamble of the November 13th Order reading -

> "The petition for removal fails to state facts showing that petitioner is

denied, or cannot enforce, in the state courts of the State of California, any rights secured to him by any law providing for the equal civil rights of citizens of the United States within the provisions of Title 28, U.S.C.A., Section 1443."

Inasmuch as the Order of the 6th was prepared by the lower court, itself, whereas, the Order of the 13th was prepared by the State the substance of which completely nullified and reversed its previous Order, the manifest point is that the lower court, by executing the later Order, permitted the District Attorney to put words in its mouth that are directly opposing its previously-declared finding.

A DISTRICT COURT MAY NOT ON ITS OWN MOTION DISMISS A PETITION FOR FAILURE TO STATE A CAUSE OF ACTION, THEREBY DEPRIVING THE PARTIES OF AN

OPPORTUNITY TO BE HEARD ON THE MATTER.

Gutensohn v. K.C.Southern Ry. Co., (1944) 140 F.2d 950.

Conclusion -

(a) The lower court, having opposing papers before it - Petition for Removal and Motion for Remand - did not order an adversary hearing thereon.

(b) The State's Motion for Remand did not comply with certain mandatory requirements of Rule 3(e)1, Local Rules - United States District Court, Central District of California - making it null, without force or effect.

(c) Petitioner did not waive, at any time, said defects.

(d) At no time did Petitioner submit his matter on the Pleadings before the lower court.

Therefore -

Petitioner's Petition For Removal re-

mains before the lower court, unimpaired and unaffected by the events occurring subsequent to November 6th, 1970.

FEDERAL COURTS SIT TO ENFORCE FEDERAL LAW; AND FEDERAL LAW EXTENDS TO THE PROCESS ISSUING FROM THOSE COURTS. THE OBLIGATION OF THE FEDERAL AGENT (JUDGE) IS TO OBEY THE RULES. THEY ARE DRAWN FOR THE INNOCENT AND GUILTY ALIKE. THEY PRECRIBE STANDARDS FOR LAW ENFORCEMENT.

Rea v. United States, (1956) 350 U.S. 214, 76 S.Ct. 292.

- * -

(c) Is A District Court Empowered To Act Ex Parte With Regard To A Removal Petition, After An Adversary Proceeding Concerning Said Petition, Is Before It?

Pertinent to Petitioner's Case -

THE FEDERAL DISTRICT COURT MUST, ON ITS OWN MOTION, MAKE APPROPRIATE

JURISDICTIONAL INQUIRY EVEN THOUGH NO MOTION TO REMAND IS FILED.

Davis v. Mutual of Omaha Ins.Co., (1968) 290 F.Supp. 217.

The lower court, upon the filing of said Petition For Removal, determined its jurisdiction of the matter as is confirmed by its declaring, in its Order, dated November 6th, 1970, to the District Attorney, that Petitioner had filed his Petition in said court, with "good cause appearing therefor", i.e., that said Petition had been filed "according to law".

A DISTRICT COURT WOULD BE UNDER DUTY TO EXAMINE ON ITS OWN MOTION THE QUESTION OF WHETHER A CASE REMOVED TO IT SHOULD BE REMANDED TO A STATE COURT, WITHOUT WAITING FOR A MOTION TO REMAND.

In re MacNeil Bros. Co., (1958) 259 F.2d 386.

The lower court ordered the State

to respond on or before November 12th, 1970, which it did, and, simultaneously therewith it filed a Motion to Remand, whereupon, the lower court summarily executed the State-prepared Order for Remand, even though -

> IT IS INCUMBENT UPON THE DISTRICT COURT WHERE ISSUE HAS BEEN JOINED BY AN ANSWER DENYING THE ALLEGATION IN THE REMOVAL PETITION, TO ASCERTAIN THE TRUTH OF THE ALLEGATIONS THROUGH EVIDENTIARY HEARINGS.
>
> Jackson v. City of Vicksburg, (1966) 361 F.2d 473.

Pertinent to Petitioner's Case -

> A MOTION TO REMAND, OR AN ANSWER DENYING MATERIAL FACTS, IS NOT SUFFICIENT TO OVERCOME A WELL PLEADED AND VERIFIED REMOVAL PETITION IN A CRIMINAL CASE, AND A FULL EVIDENT-

IARY HEARING MUST BE PROVIDED.

Kaslo v. City of Meridan,.
(1966) 360 F.2d 282.

because -

> UNLESS A FULL HEARING IS ACCORDED, A WELL PLEADED AND VERIFIED REMOVAL PETITION IS SUFFICIENT SHOULDERING OF REMOVANTS' BURDEN TO OVERCOME A MOTION FOR REMAND AND ITS SUPPORTING AFFIDAVITS.

Smith v. City of Jackson,
(1966) 358 F.2d 705.

On this very issue, this Court has ruled, in Wilson v. Republic Steel Co., (1921) 257 U.S. 92, 42 S.Ct. 35, that -

> IF A REMOVAL IS EFFECTED, THE PLAINTIFF MAY, BY A MOTION TO REMAND, PLEA, OR ANSWER, TAKE ISSUE WITH THE STATEMENTS IN THE PETITION. IF HE DOES, THE ISSUES SO ARISING MUST BE HEARD AND DETERMINED BY THE DISTRICT COURT (cited cases).

CONCLUSION

Petitioner seeks review on Writ of Certiorari from this Court inasmuch as, from the foregoing it is manifest that the Court of Appeals, for the Ninth Circuit has rendered a decision -

(1) in conflict with the decision of other Courts of Appeal on the same subject;

(2) that has so far departed from the accepted and usual course of judicial proceedings;

(3) that has so far sanctioned such a departure by the lower court;

as to call for an exercise of this Court's power of supervision.

WHEREFORE, for the reasons set forth herein, Petitioner respectfully submits that this Petition for Certiorari should be granted.

John N. Frolich
Counsel for Petitioner